STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

HUDSON, BOOKER T., JR.,
Defendant-Appellant,

v No. 06-12345

PEOPLE OF THE STATE OF MICHIGAN,
Prosecutor-Appellee.

APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

Attorneys for Appellant:

I. M. Innocent (P92345)
Clarence Darrow V (P81234)

Defense Attorneys For All, P.C.
101 South Woodward
Detroit, Michigan 48226
(313) 123-4567

Attorneys for Appellee:

U. R. Guilty (P91113)
Elliott Ness IV (P89765)

Assistant Attorneys General
Dept. of Attorney General
Lansing, Michigan 48909
(517) 987-6543

TABLE OF CONTENTS

INDEX OF AUTHORITIES

UNITED STATES CONSTITUTION

UNITED STATES SUPREME COURT CASES

UNITED STATES COURT OF APPEALS CASES

UNITED STATES DISTRICT COURT

UNITED STATES CODE PROVISION

MICHIGAN CONSTITUTION

MICHIGAN SUPREME COURT CASES

MICHIGAN COURT OF APPEALS CASES

MICHIGAN STATUTORY PROVISIONS

OTHER COURTS

STATEMENT OF QUESTIONS INVOLVED

I.

DID THE SEARCH OF DEFENDANT'S HOUSE WITHOUT PROPER NOTICE VIOLATE THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 11 OF THE MICHIGAN CONSTITUTION AND/OR THE REQUIREMENTS OF MCL 780.656?

Defendant answers "Yes"

The People answer "No"

II.

DOES THE EXCLUSIONARY RULE REQUIRE SUPPRESSION OF EVIDENCE OBTAINED AS A RESULT OF THE VIOLATION OF THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND/OR ARTICLE 1, SECTION 11 OF THE MICHIGAN CONSTITUTION AND/OR MCL. 780.656?

Defendant answers "Yes"

The People answer "No"

STATEMENT OF FACTS

On August 27, 1998, Detroit police officers forcibly raided and searched Defendant Booker T. Hudson's home on West Jeffries in Detroit, Michigan. The raid team broke into the house within three to five seconds after the police announced their presence and purpose. The police found cocaine in Defendant's home and charged Defendant with Possession with Intent to Deliver Less than 50 Grams of Cocaine under MCL 333.7401(2)(a)(iv), and Felony Firearm, in violation of MCL 750.227b.

Defendant filed a motion to suppress the evidence seized during the execution of the search warrant, alleging that the actions of the police violated the "knock and announce" requirement of the Fourth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment to the Constitution. Defendant also argued that the police action violated Article 1, Section 11 of the Michigan Constitution of 1963 and MCL 780.656, the Michigan "knock and announce" statute.

An evidentiary hearing on the motion to suppress was heard by Judge Deborah A. Thomas of the Wayne Count Circuit Court on October 10, 2000.

The Prosecution called only one witness at that hearing to testify for its position. Police Officer Jamal Good testified that the police did not hear or see anything, either inside or outside the house, that would lead them to believe that anyone was attempting to destroy property, flee or escape, or endanger the police officers. (Supp Tr p 13). Officer Good testified that he was the first member of the raid team to enter the home and that all the other members of the raid team were situated behind him. He testified that he did not knock on the door, nor did he observe any other police officer knock on

the door. (Supp Tr p 14). He further testified that the raid team forcibly entered the house within three to five seconds after the police announced their presence and purpose. (Supp Tr p 13). The police did not wait to see if anyone would answer the door before entering (Supp Tr p 15), and that the three to five second delay was just "how long it took me to go in the door". (Supp Tr p 13).

The trial court concluded that the police actions violated the "knock and announce" requirements of the United States and Michigan constitutions, as well as MCL 780.656. The trial court held that the evidence unlawfully obtained should be suppressed, although it noted that the Michigan Supreme Court and the United States Supreme Court had differing opinions as to the application of the exclusionary rule to a "knock and announce" violation.

The prosecution appealed the trial court's decision from the pretrial Suppression Hearing to the Michigan Court of Appeals, which on May 1, 2001, issued its Order in favor of the prosecution and reversing the trial court's decision on suppression. Defendant filed an Application for Leave to Appeal with this Court, which was denied on December 18, 2001.

The case was then remanded back to Wayne Circuit Court for trial before Judge Deborah A. Thomas and Defendant was found guilty of Possession of Less than 25 Grams of Cocaine, MCL 333.7403(2)(a)(5). On December 19, 2003, he was sentenced to 18 months probation.

Defendant appealed the case to the Michigan Court of Appeals, which affirmed the conviction on the basis that its earlier ruling was the law of the case.

The case is now before this Court upon grant of Defendant's application for leave to appeal.

STATEMENT OF JURISDICTION

The Order of the Court of Appeals is a final decision, subject to appeal, and this Court has jurisdiction to review the case upon leave granted.

ARGUMENT

I.

THE SEARCH OF DEFENDANT'S HOUSE WITHOUT PROPER NOTICE VIOLATED THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION, ARTICLE 1, SECTION 11 OF THE MICHIGAN CONSTITUTION, AND MCL 780.656.

Standard of Review

This Court reviews questions of law *de novo*.[1]

Discussion

The Detroit Police did not comply with the United States or Michigan Constitutional requirements when they entered Defendant's home without properly knocking and announcing their presence and purpose. The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched , and the persons or things to be seized.

The common law "knock and announce" principle is a fundamental part of the inquiry as to whether a search and seizure was reasonable.[2] In evaluating the scope of this right, the United States Supreme Court has looked to the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the Constitution's framing.[3]

---

[1] *People v. Stevens*, 460 Mich 626 (1999), *cert den* 528 US 1164 (2000).
[2] *Wilson v Arkansas*, 514 US 927, 929, 934 (1995).
[3] See *California* v. *Hodari D.*, 499 U.S. 621, 624 (1991); *United States* v. *Watson*, 423 U.S. 411, 418-420 (1976); *Carroll* v. *United States*, 267 U.S. 132, 149 (1925). "Although the underlying command of the

An examination of the common law of search and seizure leaves no doubt that the reasonableness of a search of a dwelling may depend in part on whether law enforcement officers announced their presence and authority prior to entering.

Although the common law generally protected a man's house as "his castle of defence and asylum,"[4] common law courts long have held that "when the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K[ing]'s process, if otherwise he cannot enter." [5] To this rule, however, common law courts appended an important qualification:

> But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors . . . , for the law without a default in the owner abhors the destruction or breaking of any house (which is for the habitation and safety of man) by which great damage and inconvenience might ensue to the party, when no default is in him; for perhaps he did not know of the process, of which, if he had notice, it is to be presumed that he would obey it. [6]

This basic principle was described by Sir Matthew Hale thus:

> [T]he "constant practice" at common law was that "the officer may break open the door, if he be sure the offender is there, if after acquainting them of the business, and demanding the prisoner, he refuses to open the door."[7]

Similarly, William Hawkins stated:

> [T]he law doth never allow an officer to break open the door of a dwelling but in cases of necessity, that is, unless he first signify to those in the house the cause of his coming, and request them to give him admittance.[8]

Fourth Amendment is always that searches and seizures be reasonable," *New Jersey* v. *T. L. O.*, 469 U.S. 325, 337 (1985).

[4] 3 W. Blackstone, Commentaries.

[5] *Semayne's Case*, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (K. B. 1603).

[6] *Ibid.*, 77 Eng. Rep., at 195-196.

[7] See 1 M. Hale, Pleas of the Crown *582.

[8] 2 W. Hawkins, Pleas of the Crown, ch. 14, §1, p. 138 (6th ed. 1787).

The common law "knock and announce" principle was accepted into early American law. Most of the states that ratified the Fourth Amendment had already enacted constitutional provisions or statutes generally incorporating English common law. Michigan's current Constitution contains similar language[9]:

> The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation.

The United States case law has acknowledged that the common law principle of announcement is a basic part of American law. In *Miller* v. *United States,*[10] the Court held:

> Whatever the circumstances under which breaking a door to arrest for felony might be lawful, however, the breaking was unlawful where the officer failed first to state his authority and purpose for demanding admission. … [This principle applies] whether the arrest is to be made by virtue of a warrant, or when officers are authorized to make an arrest for a felony without a warrant.

In *Wilson,*[11] the United States Supreme Court expressly held that this principle is an element of the reasonableness inquiry under the Fourth Amendment:

> Given the longstanding common law endorsement of the practice of announcement, we have little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure. Contrary to the decision below, we hold that in some circumstances an officer's unannounced entry into a home might be unreasonable under the Fourth Amendment.

[9] Mich. Const. 1963, Art. I, § 11.
[10] 357 US 301, 313 (1958).
[11] *Wilson v Arkansas*, 514 US 927, 929, 934 (1995).

Michigan's Constitutional provision[12] on reasonable searches and seizures is substantively identical to the Fourth Amendment. Where Constitutional provisions are nearly identical state courts may rule their own constitution "in parallel" with the United States Constitution.[13]

The similarity of the two Constitutional provisions also was recognized by this Court in *People v Davis*,[14] in which this Court set out the requirements for reasonableness in conducting a search:

> The Fourth Amendment of the United States Constitution prohibits unreasonable searches and seizures and provides that no warrants shall issue without probable cause. The Michigan constitutional provision is substantially the same. Const 1963, art 1, § 11. Essentially, in order to search a dwelling for evidence of a crime, the police must have probable cause to search, and must also have a warrant based on that probable cause. (Citations omitted[15]). The United States Supreme Court has recently reiterated this requirement, noting: "Searches conducted without a warrant are *per se* unreasonable under the Fourth Amendment, "'subject only to a few specifically established and well-delineated exceptions.'" (Citations omitted[16]). Thus, in order to show that a search was legal, the police must show either that they had a warrant, or that their conduct fell under one of the narrow, specific exceptions to the warrant requirement.
>
> Examples of exceptions to the warrant requirement are: (1) searches incident to arrest, (2) automobile searches and seizures, (3) plain view seizure, (4) consent, (5) stop and frisk, and (6) exigent circumstances.[17]

---

[12] Mich. Const. 1963, Art. I, § 11.
[13] *People v Collins*, 438 Mich 8 (1991); *United States v Caceres*, 440 US 741; 99 S Ct 1465 (1979); *United States v White*, 401 US 745; 91 S Ct 1122 (1971).
[14] 442 Mich 1, 572 - 573 (1993), *cert den* 508 US 947 (1993).
[15] *People v Blasius*, 435 Mich 573; 459 NW2d 906 (1990), citing *Coolidge v New Hampshire*, 403 US 443, 455; 91 S Ct 2022; 29 L Ed 2d 564 (1971); see also *Payton v New York*, 445 US 573, 590; 100 S Ct 1371; 63 L Ed 2d 639 (1980).
[16] *Horton v California*, 496 US 128, 133, n 4; 110 S Ct 2301; 110 L Ed 2d 112 (1990). See also *Mincey v Arizona*, 437 US 385; 98 S Ct 2408; 57 L Ed 2d 290 (1978).
[17] *People v Toohey*, 438 Mich 265, 271, n 4 (1991). See also *People v Blasius, supra.*

The parallel analysis has long guided Michigan Courts in reviewing the issue of reasonableness of a search. As an example, in *People v McKendrick,*[18] the Court of Appeals found:

> The Fourth Amendment of the United States Constitution and the parallel provision of the Michigan Constitution guarantee the right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. The Fourth Amendment protection against unreasonable searches and seizures is a limitation on governmental action. Therefore, the touchstone of a reviewing court's Fourth Amendment analysis is always "the reasonableness in all the circumstances of the governmental invasion of the citizen's personal security." *Michigan v Long*, 463 US 1032, 1051; 103 S Ct 3469; 77 L Ed 2d 1201 (1983) (quoting *Terry v Ohio*, 392 US 1, 19; 88 S Ct 1868; 20 L Ed 2d 889 (1968)).

Moreover, MCL 780.656 provides specific guidance, and requires that the "knock and announce" rule[19] be followed:

> The officer to whom a warrant is directed, or any person assisting him, may break any outer or inner door or window of a house or building, or anything therein, in order to execute the warrant, **if, *after* notice of his authority and purpose**, he is refused admittance, or when necessary to liberate himself or any person assisting him in execution of the warrant. (emphasis added.)

While not stating the precise amount of time that must be provided, this provision clearly requires sufficient time for a person to refuse or permit admittance. Certainly a mere three to five seconds does not meet this requirement.

This statutory provision codifies, but does not alter or limit, the common law. Any question that this provision is a restriction of the rights protected by the Fourth Amendment to the United States Constitution and Article I, § 11 of the Michigan

[18] 188 Mich App 128, 468 NW2d 903 (1991).
[19] Though popularly called the "knock and announce" statute, this measure actually does not require the police to "knock." Rather, they must give notice of their authority and purpose. People v Vasquez, 461 Mich 235, 602 NW2d 376 (1999).

Constitution was answered by the United States Supreme Court's decision in *United States v Ramirez*.[20] Many federal cases had analyzed police officers' actions within the context of 18 USC 3109, rather than the Fourth Amendment. *Ramirez* resolved any apparent conflict between the "knock and announce" requirement in § 3109 and that of the Fourth Amendment, holding that § 3109 was merely a codification of the common law, and that the decisions in *Wilson,*[21] and *Richards v Wisconsin,*[22] serve as guideposts for analysis under either provision. Likewise, MCL 780.656; MSA 28.1259(6) is a codification of the common law.

A violation of the normal knock-and-announce requirement may be excused where exigent circumstances exist. These include the probability that the suspect might flee the building, the real expectation of violence towards the officers, and the likelihood that the evidence might be disposed of within the 15 seconds between the announcement and the entering.

None of these existed here. Nothing in the search warrant or affidavit indicated that Mr. Hudson would attempt to flee, and he did not. He made no move to exit the building. In fact, he wasn't even provided sufficient time to rise from his chair, let alone open his door to the officers, which is the point of the rule. In *United States v Beck,*[23] upon the police approach to the premises to be searched, an officer saw a face in the window, which immediately disappeared from sight. The prosecution sought to justify the officers' immediate entry on the basis that this indicated that a suspect was

[20] 523 US 65; 118 S Ct 992; 140 L Ed 2d 191 (1998).
[21] 514 US 927; 115 S Ct 1914; 131 L Ed 2d 976 (1995).
[22] 520 US 385; 117 S Ct 1416; 137 L Ed 2d 615 (1997).
[23] 662 F2d 527, 530 (CA 8, 1981).

attempting to flee or destroy evidence. However, the Court disagreed, holding that the disappearance of the face in the window was an "essentially neutral" observation and did not constitute exigent circumstances.

Similarly, nothing in the search warrant here indicated that Mr. Hudson was likely to destroy evidence, and he made no move to do so. See *United States v Hidalgo,* 747 F Supp 818, 831 (D Mass, 1990), which held that where there was no concrete indication that drugs were immediately accessible or easily destroyable, there was no exigency.

Because the search warrant included weapons as well as drugs, there was the possibility that a weapon might be found during the search. From this, the prosecution has requested that this Court conclude that an immediate entry was necessary to protect the officers from danger. However, the mere possibility that a weapon might be found does not lead to the conclusion that the officers were in danger. Nothing in the testimony at the suppression hearing or at trial provided any indication that, *if* a weapon was on the premises, Mr. Hudson would use it to endanger the law officers.

Many jurisdictions have applied the *Richards*[24] decision to require that tangible evidence of danger be demonstrated in order to excuse a violation of the knock-and-announce requirement. An example is found in *Kornegay v Cottingham,*[25] where the fact that a shooting had occurred and the murder weapon had not been recovered did not establish that the suspect was in possession of it. The court held that "'officers must have more than a mere hunch or suspicion before an exigency can excuse the necessity

[24] 520 US 385; 117 S Ct 1416; 137 L Ed 2d 615 (1997).
[25] 120 F3d 392, 398 (CA 3, 1997).

for knocking and announcing their presence . . .'" Similarly, no exigency was found in *United States v Dupras,*[26] where the application for a search warrant consisted mostly of generalities regarding the habits of drug manufacturers and distributors. One previous violent criminal act was alleged in the application, a conviction based on a domestic dispute. In *State v Russell,*[27] the presence of a weapon alone was found insufficient to justify an officer's fear for his safety. The court concluded that, in order to establish exigency, the officer must have facts establishing that the suspect was armed and likely to use a weapon or become violent. In *Wynn v State,*[28] the court held that a reasonable belief that firearms may have been within the residence, standing alone, is clearly insufficient to justify excusing the knock-and-announce requirement.

Here, too, the mere indication on the warrant that there might be a weapon is insufficient to justify exigent circumstances.

In *Richards*, *supra*, the United States Supreme Court rejected the argument that the "Fourth Amendment permits a blanket exception to the knock-and-announce requirement for this entire category of criminal activity."[29] After noting that "[t]he question we must resolve is whether this fact justifies dispensing with case-by-case evaluation of the manner in which a search was executed,"[30] the Court answered with a resounding negative. "If a per se exception were allowed for each category of criminal investigation that included a considerable—albeit hypothetical—risk of danger to

[26] 980 F Supp 344, 347-348 (D Mont, 1997).
[27] 1998 WL 357546 (Ohio App, 1998).
[28] 117 Md App 133, 163; 699 A2d 512 (1997).
[29] *Richards*, *supra* at 520 US 388.
[30] *Id.* at 391-392.

officers or destruction of evidence, the knock-and-announce element of the Fourth Amendment's reasonableness requirement would be meaningless."[31]

The prosecution has no valid claim of exigent circumstances here, under the cases cited above. Without exigent circumstances justifying immediate entry, the police officers' raid of Mr. Hudson's home within five seconds of announcement clearly was unreasonable. Accordingly, the illegal entry violated Mr. Hudson's rights under the Fourth Amendment of the United States Constitution, Article 1, Section 11 of the Michigan Constitution and MCL 780.656.

II.

THE EXCLUSIONARY RULE REQUIRES SUPPRESSION OF EVIDENCE OBTAINED AS A RESULT OF THE VIOLATION OF THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION, ARTICLE 1, SECTION 11 OF THE MICHIGAN CONSTITUTION, AND MCL. 780.656.

Standard of Review

This Court reviews questions of law *de novo*.[32]

Discussion

The only reasonable remedy for violation of the reasonableness requirements of the Fourth Amendment, Mich. Const. 1963, Art. I, § 11, and MCL 780.656 is to exclude the tainted evidence obtained during the unlawful search.

The United States Supreme Court long has held that evidence obtained by federal officers under such circumstances should be suppressed. And, in 1961, that

[31] *Id.* at 394.
[32] *People v. Stevens*, 460 Mich 626 (1999), *cert den* 528 US 1164 (2000).

Court held the exclusionary rule for Fourth Amendment violations was applicable also to the states. In *Mapp v Ohio,*[33] the Court stated:

> Since the Fourth amendment's right of privacy has been declared enforceable against the states through the due process clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the federal government. Were it otherwise, then just as without the *Weeks* rule, the assurance against unreasonable federal searches and seizures would be "a form of words," valueless and undeserving of mention in a perpetual charter of inestimable human liberties.
>
> So too, without that rule, the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom "implicit in the concept of ordered liberty."
>
> At the time that the Court held in *Wolf* that the [Fourth] Amendment was applicable to the states through the due process clause, the cases of this Court, as we have seen, had steadfastly held that as to federal officers the Fourth Amendment included the exclusion of the evidence seized in violation of its provisions.
>
> ***
>
> The right to privacy, when conceded operatively enforceable against the states, was not susceptible of destruction by avulsion of the sanction upon which its protection and enjoyment had always been deemed dependent under the *Boyd*, *Weeks* and *Silverthorne* cases. Therefore, in extending the substantive protections of due process to all constitutionally unreasonable searches - state or federal - it was logically and constitutionally necessary that the exclusion doctrine - an essential part of the right to privacy - be also insisted upon as an essential ingredient of the right…
>
> In short, the … constitutional right …[of privacy under the Fourth Amendment] could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right, but in reality to withhold its privilege and enjoyment.

[33] 367 US 643, 81 S Ct 1684, 6 L Ed 2d 1081 (1961).

Only last year the Court itself recognized that the purpose of the exclusionary rule "is to deter - to compel respect for the constitutional guaranty in the only effectively available way - by removing the incentive to disregard it." *Elkins v. United States, supra*, at 217.

Indeed, we are aware of no restraint, similar to that rejected today, conditioning the enforcement of any other basic constitutional right. The right to privacy, no less important than any other right carefully and particularly reserved to the people, would stand in marked contrast to all other rights declared as "basic to a free society." *Wolf v. Colorado, supra*, at 27. This Court has not hesitated to enforce as strictly against the states as it does against the federal government the rights of free speech and of a free press, the rights to notice and to a fair, public trial, including, as it does, the right not to be convicted by use of a coerced confession, however logically relevant it be, and without regard to its reliability. *Rogers v. Richmond*, 365 U.S. 534 (1961).

And nothing could be more certain than that when a coerced confession is involved, "the relevant rules of evidence" are overridden without regard to "the incidence of such conduct by the police," slight or frequent. Why should not the same rule apply to what is tantamount to coerced testimony by way of unconstitutional seizure of goods, papers, effects, documents, etc.?

We find that, as to the federal government, the Fourth and Fifth Amendments and, as to the states, the freedom from unconscionable invasions of privacy and the freedom from convictions based upon coerced confessions do enjoy an "intimate relation" … in their perpetuation of "principles of humanity and civil liberty secured ... only after years of struggle," *Bram v. United States*, 168 U.S. 532, 543-544 (1897). They express "supplementing phases of the same constitutional purpose - to maintain inviolate large areas of personal privacy." *Feldman v. United States*, 322 U.S. 487, 489-490 (1944). The philosophy of each Amendment and of each freedom is complementary to, although not dependent upon, that of the other in its sphere of influence - the very least that together they assure in either sphere is that no man is to be convicted on unconstitutional evidence. *Cf. Rochin v. California*, 342 U.S. 165, 173 (1952).

Moreover, our holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments is not only the logical dictate of prior cases, but it also makes very good sense. There is no war between the Constitution and common sense.

***

There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine "the criminal is to go free because the constable has blundered." *People v. Defore*, 242 N.Y., 21, 150 N.E., at 587. In some cases this will undoubtedly be the result. … But, as was said in *Elkins*, "there is another consideration - the imperative of judicial integrity." 364 U.S., at 222. The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. As Mr. Justice Brandeis, dissenting, said in *Olmstead v. United States*, 277 U.S. 438, 485 (1928):

> Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example ... If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

Nor can it lightly be assumed that, as a practical matter, adoption of the exclusionary rule fetters law enforcement. Only last year this Court expressly considered that contention and found that "pragmatic evidence of a sort" to the contrary was not wanting. *Elkins v. United States*, *supra*, at 218. The Court noted that:

> The federal courts themselves have operated under the exclusionary rule of *Weeks* for almost half a century; yet it has not been suggested either that the Federal Bureau of Investigation … has thereby been rendered ineffective, or that the administration of criminal justice in the federal courts have thereby been disrupted. Moreover, the experience of the states is impressive.... The movement towards the rule of exclusion has been halting but seemingly inexorable.
>
> *Id.*, at 218-219.

The ignoble shortcut to conviction [that was heretofore] left open to the state tends to destroy the entire system of constitutional restraints on which the liberties of the people rest. … Having once recognized that the right to privacy embodied in the Fourth Amendment is Enforceable against the states, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise.

> Because it is enforceable in the same manner and to like effect as other basic rights secured by the due process clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to the individual no more than that which the constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.

Following this clear statement in 1961 by the United States Supreme Court that the exclusionary rule applies to the rights protected by the Fourth Amendment, and reiterated in *United States v Leon*,[34] this Court held in *People v Davis*,[35] that evaluation of the rights protected by the Fourth Amendment and Mich. Const. 1963, Art. I, § 11 should be analyzed in tandem since the provisions are essentially identical. Similarly, 18 USC § 3109 is essentially identical to MCL 780.656:

> MCL 780.656. Service of warrant; officer's authorization to use force.
>
> The officer to whom a warrant is directed, or any person assisting him, may break any outer or inner door or window of a house or building, or anything therein, in order to execute the warrant, if, after notice of his authority and purpose, he is refused admittance, or when necessary to liberate himself or any person assisting him in execution of the warrant.

> 18 USC § 3109. Breaking doors or windows for entry or exit.
>
> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

In *United States v Ramirez*[36] the United States Supreme Court held that § 3109 was not a restriction of the rights protected by the Fourth Amendment to the

[34] 468 US 897; 104 S Ct 3405; 82 L Ed 2d 677 (1984).
[35] 442 Mich 1, 572 - 573 (1993), *cert den* 508 US 947 (1993).
[36] 523 US 65; 118 S Ct 992; 140 L Ed 2d 191 (1998).

United States Constitution. Since the provisions are virtually identical, the same analysis requires that this Court conclude that MCL 780.656 does not restrict or modify Article I, § 11 of the Michigan Constitution. MCL 780.656 simply codifies the common law relating to unreasonable searches. Like § 3109, it does not change the protections of Article I, § 11, and therefore, exclusion of evidence obtained pursuant to a search in violation of the Fourth Amendment and Article I, § 11 must be excluded.

In *United States v Leon,* [37] the Supreme Court held that the only appropriate remedy in that case was exclusion of the evidence. Here, there is no indication that the officers' conduct was objectively reasonable. Rather, there was a clear violation of the knock-and-announce rule, without the presence of exigent circumstances. The Fourth Amendment limitations are designed to deter precisely this kind of conduct. The incentive for officers to operate within those limitations in the future is provided by our application of the exclusionary rule.

Similarly, in *United States v Bates,*[38] our Sixth Circuit held that, unless exigent circumstances exist, the failure of state law enforcement officials to knock and announce their presence will render evidence seized inadmissible.[39]

[37] 468 US 897; 104 S Ct 3405; 82 L Ed 2d 677 (1984).
[38] 84 F3d 790, 795 (CA 6, 1996).
[39] See also *United States v Moore,* 91 F3d 96 (CA 10, 1996) (affirming the district court's suppression of the evidence where the police violated the knock-and-announce rule); *United States v Becker,* 23 F3d 1537 (CA 9, 1994) (holding that evidence obtained during execution of a search warrant should be suppressed because of the officers' failure to knock and announce where no exigent circumstances were present); *United States v Knapp,* 1 F3d 1026, 1030 (CA 10, 1993), citing *United States v Ruminer,* 786 F2d 381, 383 (CA 10, 1986) (holding that "[e]vidence seized must be suppressed as the fruit of an unlawful search" if the officers failed to comply with the knock-and-announce statute).

Yet, despite this strong precedent, the prosecutor argues that, where the police are in possession of a valid warrant, and yet are deficient in the manner of announcing their entry as they execute the warrant, it is only their entry, not the search itself, that suffers from the taint of unreasonableness. In essence, the prosecutor is saying that, where the entry is unlawful or unreasonable, the remainder of the search is nonetheless lawful because it occurs pursuant to a (presumably) lawfully obtained and valid warrant.

To accept this argument, one must accept the prosecutor's view of the dichotomy of the situation. The essence of this argument is that the search itself is wholly detached from the execution of the warrant. Whatever happens during the entry, it does not affect the basis for the warrant, and, therefore, the warrant itself remains lawful. Given the presence of this lawful warrant, whatever evidence is in dispute would have been "inevitably" discovered pursuant to the lawful warrant.

Such a result, quite simply, knows no bounds. Under this rationale, evidence will always have been "inevitably" discovered. This view separates the relationship between the knock-and-announce violation and the discovery of the evidence. Accordingly, it would then follow that there will *never* be any such relationship, no matter how severe and unwarranted the knock-and-announce violation is. No matter the constitutional violation, there would be no remedy.

This Court should reject the prosecutor's argument that whatever constitutional intrusion there might be, we simply ignore it and concern ourselves not in the least with

either sanctioning it or avoiding encouragement that it might continue. The effect of such a rule would prevent a court from ever applying the exclusionary rule when faced with an unreasonable violation of the knock-and-announce principle.

A unanimous Supreme Court in *Richards*[40] noted:

> It is always somewhat dangerous to ground exceptions to constitutional protections in the social norms of a given historical moment. The purpose of the Fourth Amendment's requirement of reasonableness "is to preserve that degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted—even if a later, less virtuous age should become accustomed to considering all sorts of intrusion 'reasonable.'"

We should not be swayed from protection of our citizens' constitutional rights by the prosecution's dire warnings about rising drug crimes and violence. There always have been, and always will be, alarms sounded about the problems of the times. Permitting government to trample on our constitutional safeguards will not cure the problems – rather it will set a model that will encourage further lawbreaking by citizens and government alike.

Because this Court held in *People v Stevens*[41] that the exclusionary rule did not apply to a situation such as this, Appellant requests that the Court reconsider and reverse its holding in that decision, and hold here that the exclusionary rule requires that the evidence found during the unreasonable search of Mr. Hudson's premises be suppressed.

---

[40] 520 US 392, n 4, quoting *Minnesota v Dickerson*, 508 US 366, 380; 113 S Ct 2130 (1993) (Scalia, J., concurring).
[41] 460 Mich 626, 597 NW 2d53 (1999).

RELIEF REQUESTED

Defendant-Appellant requests that this Court hold that the Prosecutor-Appellee violated Appellant's constitutionally guaranteed rights under US Constitution, Amendment IV and Mich. Const. 1963, Art. I, § 11, and his statutory rights under MCL 780.656.

Appellant further requests that this Court order suppression of the evidence found pursuant to that unreasonable and unconstitutional search, vacate Appellant's conviction and remand the case to the trial court for further proceedings consistent with the Court's Opinion and Order.

Dated: January 1, 2006.

Respectfully submitted,

_____
I. M. Innocent (P92345)

_____
Clarence Darrow V (P81234)
Attorneys for Defendant-Appellant

Defense Attorneys For All, P.C.
101 South Woodward
Detroit, Michigan 48226
(313) 123-4567